

The respondent requests review of this Order asserting that claimant failed to establish that his physical complaints stem from an accident arising out of and in the course of his employment. Highly summarized, respondent maintains that claimant's version of the events surrounding his accident are inconsistent, so much so that he cannot

be believed. Thus, he has failed to establish a compensable claim and the Order should be reversed.<sup>1</sup>

Claimant argues the ALJ's Order should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked for the respondent as a metal stud framer and carpenter. He worked for respondent for three weeks before he was injured on May 9, 2006. Claimant states that he slipped and fell while going up a ladder to the second floor to put angle braces on and plumbing up windows.<sup>2</sup> Claimant says he hit the foundation with his right knee and right wrist. Claimant's explanation for precisely where he fell during construction of this particular building has been, admittedly, less than consistent.

Claimant testified that he informed Roger Klima, his supervisor, who was working at the front of the building of his fall.<sup>3</sup> Mr. Klima stated that he did not see the claimant fall and that he was not informed of the fall until someone from the hospital called him on May 10, 2006 to ask him some questions about the claimant and his workers compensation accident. Mr. Klima also testified that claimant was not assigned to work on a ladder, the point being that he could not have fallen since he was not instructed to be on a ladder.

Claimant sought treatment on May 10, 2006 at the emergency room. The doctor at the hospital diagnosed the claimant with "sprained right wrist, sprained right knee". He was given pain medications and a referral to an orthopaedic physician. Claimant never saw the orthopaedist as the referral was never authorized, so the claimant attempted to return to work. When claimant got to the job site he was told that he was being laid off due to lack of work.

Claimant states that his current physical condition does not allow him to work in the construction industry, which would include warehouse work. Claimant also stated that he

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<sup>1</sup> There are musings in the record about notice and jurisdiction being at issue. But neither issue was briefed by respondent. Moreover, it appears uncontradicted that respondent received notice the day after claimant's alleged accident. And there is no evidence within the record that Kansas has no jurisdiction over this claim. Thus, neither of these issues, while jurisdictional for purposes of the Board's jurisdiction from a preliminary hearing, will be addressed as they are apparently no longer in dispute.

<sup>2</sup> P.H. Trans. at 5.

<sup>3</sup> *Id.* at 9.

gets numbness and tingling in his wrist, and has swelling and popping in the back of his knee.

The ALJ granted claimant's request for benefits. In ruling in claimant's favor, he no doubt took into consideration claimant's credibility and that of Roger Klima. Distilled to its simplest terms, the testimony of these individuals is vastly different. And there is admittedly some discrepancy in claimant's recitation of the situs of his accident. Nonetheless, the ALJ seemed to be persuaded by claimant's credibility. And it is worth noting that within one day of his alleged accident, claimant sought treatment and was diagnosed with sprains to his knee and wrist, the two areas he claims were injured in the fall.

Historically, the Board has found that where there is conflicting testimony contained in the record, it is significant that the ALJ had the opportunity to observe the testimony of the witnesses. And in this instance, this member of the Board finds that some deference should be given to the ALJ's conclusions because he had the opportunity to assess the witnesses' credibility when they testified. Thus, this Board Member finds the ALJ's conclusion as to the accident and the finding that it arose out of and in the course of his employment is affirmed.

The balance of respondent's argument, namely that claimant is not "entitled to medical treatment and temporary total disability due to the alleged accidental injury" is dismissed as there is no jurisdiction under K.S.A.44-534a to consider these issues. At this juncture the ALJ has sole authority to decide a claimant's entitlement to TTD and medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>4</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated March 29, 2007, is affirmed in part and dismissed in part.

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<sup>4</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2007.

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BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant  
Shelly E. Naughtin, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge